

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

OTIS HALL,

Plaintiff,

vs.

BRADFORD R. JERBIC, *et al.*,

Defendants.

Case No. 2:09-cv-01871-JCM-PAL

ORDER AND REPORT OF FINDINGS
AND RECOMMENDATION

(IFP Application - Dkt. #2)

Plaintiff Otis Hall is proceeding in this action *pro se*. On September 28, 2009, Plaintiff submitted a Complaint (Dkt. #1) pursuant to 42 U.S.C. § 1983 on September 23, 2009. On July 28, 2010, the court entered an Order (Dkt. #2) noting that Plaintiff did not pay the required filing fee of \$350.00 or file an application to proceed *in Forma Pauperis* in compliance with 28 U.S.C. § 1915(a)(1) and (2) and Local Rules LSR 1-1 and 1-2. The court directed Plaintiff to either pay the filing fee or submit an application. On August 23, 2010, Plaintiff filed an Application to Proceed *In Forma Pauperis* (Dkt. #2). This proceeding was referred to this court by Local Rule IB 1-9.

I. *In Forma Pauperis* Application

Plaintiff has submitted the affidavit required by § 1915(a) showing an inability to prepay fees and costs or give security for them. Accordingly, the request to proceed *in forma pauperis* will be granted pursuant to 28 U.S.C. § 1915(a). The court will now review Plaintiff's complaint.

II. Screening the Complaint

Upon granting a request to proceed *in forma pauperis*, a court must additionally screen a complaint pursuant to § 1915(a). Federal courts are given the authority dismiss a case if the action is legally "frivolous or malicious," fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). When a

1 court dismisses a complaint under § 1915(a), the plaintiff should be given leave to amend the complaint
2 with directions as to curing its deficiencies, unless it is clear from the face of the complaint that the
3 deficiencies could not be cured by amendment. *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir.
4 1995).

5 Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a complaint for
6 failure to state a claim upon which relief can be granted. Review under Rule 12(b)(6) is essentially a
7 ruling on a question of law. *See Chappel v. Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir.
8 2000). A properly pled complaint must provide a short and plain statement of the claim showing that
9 the pleader is entitled to relief.” Fed.R.Civ.P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,
10 555 (2007). Although Rule 8 does not require detailed factual allegations, it demands “more than labels
11 and conclusions” or a “formulaic recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*, 129
12 S.Ct. 1937, 1949 (2009) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). The court must accept as
13 true all well-pled factual allegations contained in the complaint, but the same requirement does not
14 apply to legal conclusions. *Iqbal*, 129 S.Ct. at 1950. Mere recitals of the elements of a cause of action,
15 supported only by conclusory allegations, do not suffice. *Id.* at 1949. Secondly, where the claims in the
16 complaint have not crossed the line from plausible to conceivable, the complaint should be dismissed.
17 *Twombly*, 550 U.S. at 570.

18 The Complaint (Dkt. #1) was filed on the court’s form civil rights complaint pursuant to 42
19 U.S.C. § 1983. To state a claim under section 1983, a plaintiff must allege that a right secured by the
20 Constitution has been violated, and the deprivation was committed by a person acting under color of
21 state law. *West v. Atkins*, 487 U.S. 42 (1988) (citation omitted). States and state officers sued in their
22 official capacity are not “persons” for the purposes of a section 1983 action, and generally, they may not
23 be sued under the statute. *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71 (1989). Section 1983
24 does allow suits against state officers in their individual capacities. *Hafer v. Melo*, 502 U.S. 21, 26
25 (1991).

26 Plaintiff’s Complaint alleges he was harassed by Officer Herrera for riding a moped. He alleges
27 Officer Herrera used a taser and arrested Plaintiff because Plaintiff is black and because Officer Herrera
28 believes all black people carry weapons. In count two, Plaintiff alleges that City Attorney Bradford

1 Jerbic knew all seven of the charges brought against Plaintiff were false. Plaintiff notes that he was
2 only tried on three of the original seven charges and wonders “how can the City Attorney pick out
3 which charges he want[s] to drop or keep.” Plaintiff seeks compensatory damages in the amount of
4 \$200 dollars per day for each day he was wrongfully incarcerated, and he seeks to have Officer Herrera
5 removed from his job.

6 Plaintiff cannot state a claim against City Attorney Bradford Jerbic. Prosecutors are absolutely
7 immune from liability for violating the constitutional rights of others when acting within the scope of
8 their duties. *See Imbler v. Pachtman*, 434 U.S. 409, 427 (1976). In determining whether a defendant
9 enjoys absolute prosecutorial immunity, the court examines the nature of the function performed, not
10 the identity of the actor who performed it. *See Kalina v. Fletcher*, 522 U.S. 118, 127 (1997). *Imbler*
11 instructed that prosecutors are absolutely immune from suit when they function as advocates. *Imbler*,
12 424 U.S. at 430-31. Thus, prosecutors engaged in traditional prosecutorial functions—those activities
13 “intimately associated with the judicial phase of the criminal process”—are absolutely immune from
14 suits under Section 1983. *Id.* at 430. Because Plaintiff is attempting to state a claim against City
15 Attorney Bradford Jerbic for actions taken in connection with prosecuting Plaintiff’s criminal case,
16 Defendant Jerbic is immune from suit. Therefore, it will be recommended that Plaintiff’s claim against
17 Defendant Jerbic be dismissed.

18 Plaintiff can also not state a claim against Defendant Herrera. It is well-settled that federal
19 district courts do not have appellate jurisdiction over a state court, whether by direct appeal, mandamus,
20 or otherwise. *See, e.g., Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *Bianchi v. Rylaarsdam*, 334
21 F.3d 895, 898 (9th Cir. 2003). Moreover, the Supreme Court has held that a § 1983 action cannot be
22 used to collaterally attack a criminal conviction unless the conviction or sentence has been reversed on
23 direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such
24 a determination. or called into question by a federal court’s issuance of a writ of habeas corpus. *See*
25 *Heck v. Humphrey*, 512 U.S. 477, 484 (1994) (stating “We think the hoary principle that civil tort
26 actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments
27 applies to § 1983 damages actions”). *Heck* is grounded in the “strong judicial policy against the
28 creation of two conflicting resolutions arising out of the same or identical transaction.” *Id.* at 484.

1 Here, it does not appear that Plaintiff's conviction has been reversed on direct appeal, expunged by
2 executive order, declared invalid, or called into question. As a result, it will be recommended that
3 Plaintiff's claims concerning his state court conviction be dismissed.

4 Lastly, Defendant has not stated any facts or allegations against Officer Sibbett. Defendant
5 Sibbett is listed on the page of the Complaint enumerating the Defendants, and it appears he is an
6 officer with the Department of Detention. Plaintiff states this Defendant committed perjury by putting
7 his name on a false report, but he states no other facts to support this claim. Because the claim appears
8 to relate to Plaintiff's arrest, this claim is barred by *Heck* for the reasons set forth above.


9 Based on the foregoing,

10 **IT IS ORDERED:**

- 11 1. Plaintiff's Application to Proceed *In Forma Pauperis* (Dkt. #2) is GRANTED.
12 2. The Clerk of Court shall file Plaintiff's Complaint.

13 **IT IS RECOMMENDED** that Plaintiff's Complaint be DISMISSED for failure to state a claim
14 upon which relief can be granted.

15 Dated this 26th day of August, 2010.

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18 PEGGY A. LEEN
19 UNITED STATES MAGISTRATE JUDGE
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